Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	
Public Utilities Commission	)	PR Docket No. 94-105
of the State of California	)	
to Retain Regulatory Authority	)	
over Intrastate Cellular Service	)	
	)	

RESPONSE TO MOTION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO REJECT PETITION OR, ALTERNATIVELY, REJECT REDACTED INFORMATION

Cellular Resellers Association, Inc. ("CRA"), Cellular Service, Inc. and ComTech Mobile Telephone Company (collectively "Resellers"), acting pursuant to Commission Rules 1.45 and 1.4, hereby respond to the above-captioned motion of the Cellular Carriers Association of California ("CCAC").

CCAC requests that the Commission either deny the Petition of the California Public Utilities Commission ("CPUC") or preclude consideration of the redacted information in the Petition. CCAC further claims that (1) the submission of confidential information to the FCC violates the CPUC's General Order 66-C, (2) the information was obtained by the CPUC from the California Attorney General in violation of California law, (3) the redacted version of the Petition deprives the public of the ability to respond to the CPUC Petition, (4) this Commission cannot rely on any such information that is not disclosed without running afoul of due process considerations and the Administrative Procedure Act, 5 U.S.C. § 553, and (5) the very nature of the confidential information supplied by the CPUC precludes CCAC from supporting its public disclosure.

CCAC's claims are meritless. As a general matter, Resellers support the September 26, 1994 Opposition of California to Motion To Reject Petition Or, Alternatively, Reject Redacted Information. In that Opposition, the State of California clearly shows that it was entitled to supply the Commission with the information it obtained from CCAC and its constituent members and then submit that information under seal to the FCC. See California Opposition at 10-14. Likewise, California notes that the plain language of applicable statutes entitled the CPUC to receive and convey to the FCC the Attorney General's information. California Opposition, supra.[1] More specifically, Section 1181 (f) of that California Government Code provides for disclosure of material "to any governmental agency responsible for enforcing laws related to the unlawful activity discovered." In Northern California Power Agency v. Public Utilities Commission, 5 C.3d 370 (1971), the court explained that that statutory provision requires "that the [CPUC] must take into account the antitrust aspects of applications before it." Id. at 379. In so doing, the CPUC must determine market definition and the effect of its decisions upon competition. Id. at 380. Thus, the CPUC is an agency that enforces laws "related" to the noted activity and, therefore, has acted in accord with Government Code.[2]

CCAC's alleged concern about the public's inability to comment on the redacted version is disingenuous. On September 19, 1994, the National Cellular Resellers Association ("NCRA") filed a Request For Access to insure access for the commenting parties to the

---

[1] California also notes that the California Attorney General could have released the material directly to the FCC if he had so desired. Ibid.

[2] Indeed, if there were a defect in the State's process of collecting and disseminating information on a confidential basis, CCAC is in the wrong forum and should address its concerns to the PUC or the California State Courts under California civil law. CCAC has no standing to raise alleged violation of state laws before the Commission, because the Commission makes no adjudications of such matters which fall outside its jurisdiction. See generally Regents v. Carroll, 338 U.S. 586 1950); Sonderling Broadcasting, 46 RR2d 889, 894 (1979).

redacted material through nondisclosure agreements. NCRA submitted a draft nondisclosure agreement modeled after the procedure established for review of confidential and commercially sensitive information in the AT&T/McCaw Merger Application. See Attachment 1 hereto. In addition, the Private Radio Bureau convened a meeting of counsel for all parties on September 30, 1994, to discuss a proposed nondisclosure agreement. CCAC and its constituent members objected to any such agreement and even resisted the invitation to comment in the alternative on the form of the nondisclosure agreement.

CCAC's posture is pure gamesmanship. CCAC and its constituent members could have had access to the information (with nondisclosure agreements) in the CPUC proceeding. Instead, they voluntarily chose not to acquire or review the material. CCAC and its constituent members demanded that the information requested by the CPUC in its Investigation 93-12-007 (and which resulted in its Dec. 94-08-022, see Appendix A to California Petition) be held confidential. On April 11 and 22, 1994, the CPUC requested the information which CCAC and its members demanded be held confidential pursuant to State G.O. 66-C. Pursuant to a May 5, 1994 ALJ ruling, the CPUC set forth a process for such G.O. 66-C claims and the right of "any party" to view such material pursuant to nondisclosure agreements. See May 5, 1994 ALJ Ruling at paras. 3 & 5, Attachment 2 hereto. Neither CCAC nor its members requested the opportunity to review the data. See July 19, 1994 ALJ Ruling. In contrast, CRA requested and was granted access to the data via nondisclosure agreements. A copy of one such nondisclosure agreement with CCAC is Attachment 3 hereto.[3]

---

[3] Of all the California carriers, only McCaw withheld its capacity utilization information from CRA.

CCAC's arguments are further undermined by its own effort to withhold information from public disclosure except through nondisclosure agreements like the one proposed by NCRA and the Bureau. In pleadings before the CPUC, CCCA said that its own secret study should be available solely under nondisclosure agreements. That secret study purports to show that retail cellular rates in large markets for "optimal" plans for high, medium and low volume customers have decreased since 1990. CCAC insisted in the California proceeding that such information should not be publicly available but nonetheless should be relied upon by the CPUC. See September 14, 1994 ALJ Ruling and CCAC Opening Comments at 20-21, Attachment 4 hereto. Thus, CCAC appears to support "secret" records only when it is the gatekeeper and the studies are skewed in its favor.

In any event, the CPUC reiterated its order that the CCAC study be made available to any party under a nondisclosure agreement.[4]

The simple answer to the complaints of CCAC and its members is that the confidential data in the Petition can again be made available in the instant proceeding pursuant to nondisclosure agreements. Use of those agreements will provide CCAC and its members with the very opportunity to comment which they seek without compromising the confidential nature of the information.

---

[4] AirTouch claims in a related September 29, 1994 Opposition to the NCRA request, that it did not provide CRA any confidential data to CRA. See Opposition of AirTouch Communications To Request Of The National Cellular Resellers Association For Access To California Petition For State Regulatory Authority Pursuant To The Terms Of A Protective Order at 3. AirTouch is wrong. Attachment 5 hereto is a copy of the cover pleading noting AirTouch's apparent compliance with the ALJ Order. Attachment 6 hereto is an October 3, 1994 letter to AirTouch's counsel requesting any confidential information that was withheld from CRA in violation of the ALJ Rulings.

Conclusion

WHEREFORE, for the foregoing reasons, the Commission should deny both of CCAC's requests.

Respectfully submitted,

Law Offices of Peter A. Casciato,
A Professional Corporation
8 California Street Suite 701
San Francisco, CA 94111
(415) 291-8661

By: _____
Peter A. Casciato

Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(202) 789-3400

By: _____
Lewis J. Paper

Attorneys for Cellular Resellers
Association, Inc., Cellular Service, Inc.,
and ComTech Mobile Telephone Company

ATTACHMENT 1

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

May 18, 1994

Francine J. Berry
Marilyn J. Wasser
American Telephone and Telegraph Company
295 North Maple Avenue
Room 3244J1
Basking Ridge, N.J. 07920

David W. Carpenter
Mark D. Schneider
Marc E. Raven
Sidley & Austin
One First National Plaza
Chicago, IL 60603

R. Michael Senkowski
Katherine M. Holden
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: AT&T/McCaw Merger Applications
File No. ENF 93-44

Counselors:

This letter is to clarify the scope of the Common Carrier Bureau's (Bureau's) recent request to examine documents and information filed by American Telephone and Telegraph Company (AT&T) and McCaw Cellular Communications, Inc., (McCaw) (together "the applicants") with the Department of Justice (the Department) and the Federal Trade Commission (FTC) pursuant to the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act.[1]

The Bureau is interested in examining documents and information filed with the Department and the FTC that pertain to the following marketplace areas:

---

[1] Letter from Gregory A. Weiss to Francine J. Berry, et al., dated May 13, 1994.

(1) domestic interexchange "Basket 1" services;[2]

(2) local cellular services;

(3) cellular-originated interexchange services; and

(4) the manufacture and sale of cellular infrastructure equipment and software.

To facilitate examination of such documents and information by the staff and counsel for the parties, we request that the applicants provide for the record an index identifying any and all documents and other information filed with the Department and the FTC that pertain to the above-mentioned areas.[3] Such index will be governed by the terms of the Protective Order entered by the staff on May 13, 1994[4] and may not be used or distributed by any party in a manner inconsistent with such Protective Order. Within five business days after it receives the index, the staff will issue a letter identifying the documents and information to be made available for examination by the Bureau and counsel for the parties at a mutually convenient off-FCC premises location.[5]

We also expect that the applicants will make a copy of the Department's "second request" for information available for examination by the staff and by parties' counsel of record that have executed confidentiality agreements in accordance with the May 13, 1994 Protective Order.

---

[2] See Policy and Rules Concerning Rates for dominant Carriers, 4 FCC Rcd 2873, 3052-65 (1989). See also the Commission's price cap rules, particularly 47 C.F.R. § 61.42.

[3] We are not requesting access to copies of documents that are part of the public FCC record for decision in this matter, including the pending transfer of control applications, pleadings and other documents of record. Accordingly, such documents need not be listed in the index.

[4] Protective Order, adopted May 13, 1994, by the Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau.

[5] For purposes of the Commission's analysis of the competitive effects of the proposed merger, examinations of the applicants' Hart-Scott-Rodino filings will be limited to the documents and information designated for review by the Bureau. The applicants and the parties are encouraged to promptly execute confidentiality agreements covering this material to enable the earliest practicable examination of such materials.

Please direct any questions regarding any of the foregoing to Adrien Auger, Senior Attorney with the Bureau's Enforcement Division, at (202) 632-4887. Once again, we remind participants in this restricted adjudicative proceeding of the ex parte requirements set forth in Sections 1.1208 - 1.1214 of the Commission's rules, 47 C.F.R. §§ 1.1208 - 1.1214.

Sincerely,

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

cc: Parties of record
Department of Justice
Federal Trade Commission

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

May 26, 1994 43241

Francine J. Berry
Mark C. Rosenblum
American Telephone and Telegraph Company
295 North Maple Avenue
Room 3244J1
Basking Ridge, N.J. 07920

David W. Carpenter
Mark D. Schneider
Marc E. Raven
Sidley & Austin
One First National Plaza
Chicago, IL 60603

R. Michael Senkowski
Katherine M. Holden
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: AT&T/McCaw Merger Applications
File No. ENF 93-44

Counselors:

This letter is to further define and limit the scope of the Common Carrier Bureau's (Bureau's) recent request to examine documents and information filed by American Telephone and Telegraph Company (AT&T) and McCaw Cellular Communications, Inc., (McCaw) (together "the applicants") with the Department of Justice (the Department) and the Federal Trade Commission (FTC) pursuant to the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act.[1]

The Bureau is interested in examining the following information and documents filed with the Department:

1. All Premerger Notification Report Forms filed by the applicants, including documents designated pursuant to Item 4(c).

---

[1] Letters from Gregory A. Weiss to Francine J. Berry, et al., dated May 13 and May 18, 1994.

2. All information filed pursuant to the following interrogatories and document requests of the Department's "Second Request" to:

AT&T

Interrogatory Nos. 6, 7, 8, 9, 10(except (c)(1)), 11, 17, 20, 26, 27, 28, 31, 32 and 37.

Document requests 7, 13, 18, 31, 32 and 33.

McCAW

Interrogatory Nos. 3, 12, 13, 14, 16, 19, 20 (except (c)(1)), and 23.

Document requests 5, 10, 21, 22, 23, 29, 31 and 36.

The applicants should promptly take all reasonable and necessary steps to make available, at a mutually convenient off-FCC premises Washington, D.C. location, sufficient copies of the Department's "second request" for information, the indices of the documents and other information submitted to the Department, and their responses to the interrogatories specified above, for examination simultaneously by Commission staff and by counsel for parties of record that have executed confidentiality agreements in accordance with the May 13, 1994 Protective Order, as amended May 20, 1994. The applicants should promptly also make available, at the same Washington location, for inspection by the staff and by parties' counsel, a copy of their responses to the document requests identified above.

Examinations of the information and materials by counsel for the parties must be completed by June 20, 1994, the revised due date for any further comments on the merger application. Applicants may file responsive comments not later than July 1, 1994.[2]

---

[2] For purposes of the Bureau's analysis of the competitive effects of the proposed merger, examination of the applicants' Hart-Scott-Rodino filings by the staff and counsel for the parties will be limited to the information and materials designated herein. Requests or petitions to expand the scope of such examination or to extend the deadlines for examining the materials and filing further comments will not be entertained in the absence of extraordinary circumstances and a specific factual showing that good cause exists for delaying the Commission's decision in this matter. The Commission, however, reserves the right to request that the applicants make additional information and materials available for inspection or for

Please direct any questions regarding any of the foregoing to Adrien Auger, Senior Attorney with the Bureau's Enforcement Division, at (202) 632-4887. Once again, we remind participants in this restricted adjudicative proceeding of the ex parte requirements set forth in Sections 1.1208 - 1.1214 of the Commission's rules, 47 C.F.R. §§ 1.1208 - 1.1214.[3]

Sincerely,

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

cc: Parties of record
Department of Justice
Federal Trade Commission

---

the record.

[3] We acknowledge receipt of letters dated May 24, 1994 on behalf of the Bell Atlantic and BellSouth companies and a letter dated May 25, 1994 on behalf of Southwestern Bell commenting on the applicants' May 19, 1994 letters. We do not address here the specific arguments and proposals set forth by the parties in their letters with regard to the scope and mechanics of the staff's and counsel for the parties' review of the applicants' Hart-Scott-Rodino materials. We expect counsel for the applicants and parties to work out the logistics and details of viewing the materials described herein that are to be made available for the staff's inspection, given all the circumstances, including the magnitude of the task, the number of parties involved, and time constraints for a timely Commission decision in this matter.

ATTACHMENT 2

TRP/sid

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING EXTENSION OF TIME TO PROVIDE SUPPLEMENTAL INFORMATION AND PROVIDING FOR ACCESS OF CONFIDENTIAL DATA

By Administrative Law Judge (ALJ) ruling dated April 11, 1994, various cellular carriers were directed to provide certain information by April 29, 1994, with respect to operations within their service areas. During the week of April 25, 1994, a majority of these carriers filed motions for extension of time to submit the data as directed in the ruling. These motions are summarized below.

On April 25, 1994, Century El Centro Cellular Corporation filed a motion for an extension until May 13, 1994, to provide information responsive to the April 11 ruling. Century explains that because of its transition to new vendor billing, accessing the data required to respond to the April 11 ruling has been more difficult. As a result, Century asks the time extension to compensate for the delays it has encountered in compiling the data response.

On April 27, 1994, Fresno MSA Limited Partnership and Contel Cellular of California, Inc. filed a motion for an extension until May 13, 1994. The carriers assert that delays in meeting the deadline have been experienced due to archive retrieval constraints and related data compilation problems.

On April 27, 1994, GTE Mobilnet of California (GTE) also filed for an extension of time until May 16, 1994, asserting similar problems in compiling data. GTE notes also that the individual responsible for compiling data responses is simultaneously charged with compiling data in other contexts.

Since a subsequent ALJ ruling dated April 22, 1994, has directed further compilation of data due on May 16, 1994, GTE believes it can provide all of the data sought through both ALJ rulings by the latter date.

On April 29, 1994, McCaw Cellular Communications, Inc. filed a motion for an extension of the deadline on behalf of three of the cellular carriers which were directed to respond to the April 11 ruling. McCaw seeks an extension of time until May 6, 1994 to file responses to the April 11 ruling because it has taken longer than anticipated for McCaw to compile and review the pertinent documentation. McCaw submits that neither the Commission nor any interested party will be adversely affected by its request for more time.

On April 29, 1994, Airtouch Cellular submitted a letter to the ALJ by facsimile requesting an extension to May 2, 1994 to provide responses. Airtouch stated the extension would ensure that all available information responsive to the ruling was being provided. By telephone message on May 2, 1994, legal counsel for Airtouch advised the ALJ that the responsive material would not finalized in time for submission on May 2, and requested one additional day extension for submission of the response.

On April 29, 1994, US West Cellular of California (US West) submitted a letter likewise stating that it would be unable to meet the deadline for providing the data because the compilation had "proven to be a formidable task in the two weeks" since receiving the ALJ ruling. US West references motions filed by "at least two other carriers" seeking a time extension, and asks that those motions be granted and that the extension be applied to all carriers identified in the ruling.

Discussion

A number of the cellular carriers seeking an extension did not notify the ALJ of an anticipated delay in meeting the deadline for responses until the day responses were due. As a

result, this ruling on the motions is being issued after the responses have become overdue. In the future, parties should attempt to anticipate delays in meeting deadlines as early as possible rather than waiting until the deadline is at hand to notify the ALJ that a deadline cannot be met and to seek remedial relief.

Given the difficulties in compiling the requested information as explained in the pleadings, time extensions will be granted not to exceed the date requested by each carrier. These extensions provide ample time for responses to be made, and no further approval of extensions should be expected.

The request of US West to grant a blanket extension to all carriers is denied. US West provides no basis justifying a blanket extension date applied to everyone. Each carrier has made its own independent assessment of how much additional time it needs, and should be held to that assessment. US West does not indicate how much of an extension it requires, but merely references the requests for extensions of "at least two other carriers." Since each carrier has asked for a different length of extension, it is unclear which time extension US West has in mind for itself. US West will be granted an extension equal to that of Century.

Nondisclosure of Data

Some of the data which has been already submitted in response to the April 11 ruling has been provided confidentially under General Order (GO) 66-C and Public Utilities (PU) Code § 583. The cellular carriers which assert claims of confidentiality with respect to data submitted to the Commission bear the burden to prove that they are entitled to keep such data from public scrutiny. As stated in Pacific Bell, 20 CPUC 2d 237, 252 (1986), confidential treatment should be granted only upon a showing that release of the data would lead to "imminent and direct harm of major consequence, not a showing that there may be a harm or that

the harm is speculative and incidental." Accordingly, any cellular carrier asserting claims of confidentiality for data submitted in this proceeding shall submit a motion for protection from disclosure, providing justification as called for in the above-referenced Pacific Bell decision. Those parties which have already filed responsive data pursuant to the ALJ ruling under GO 66-C shall likewise file a motion for nondisclosure, explaining the nature of the harm which would result from disclosure.

The Commission's Division of Ratepayer Advocates will have access to such confidential data subject to the provisions of PU Code § 583. Other parties to the proceeding are restricted from reviewing confidential data absent a ruling ordering public disclosure of the data or execution of a nondisclosure agreement permitting limited access under prescribed conditions. For purposes of the data provided in this proceeding subject to confidentiality claims under GO 66-C and PU Code § 583, the procedures outlined below shall be followed on an interim basis pending a final ruling on the merits of asserted confidentiality claims.

IT IS RULED that:

1. The following cellular carriers shall be granted an extension until the dates designated below to provide the data as directed in the ALJ ruling of April 11, 1994:

Fresno MSA and Contel Cellular	May 16, 1994
GTE Mobilnet	May 16, 1994
Century El Centro Cellular Corp.	May 13, 1994
US West Cellular	May 13, 1994
McCaw Cellular	May 6, 1994
Airtouch Cellular	May 3, 1994

2. In addition to the ALJ, a copy of the response should be provided to the Commission Advisory and Compliance Division, Attention: Fassil Fenikile (415-703-3056).

3. Any carrier asserting confidentiality claims with respect to the data provided pursuant to either the April 11 or April 22 rulings shall file a motion no later than May 16, 1994 seeking protection from public disclosure of such data together with justification as to the imminent and direct harm which would result from such disclosure.

4. Without prejudice as to the merits of any claims of confidentiality asserted for data provided pursuant to the April 11 or April 22 rulings, access to such data by other parties to the proceeding shall be governed through appropriate nondisclosure agreements.

5. Any party to this proceeding (other than the Commission's Division of Ratepayer Advocates) interested in reviewing any of the data submitted under GO 66-C subject to claims of confidentiality shall advise the respective cellular carrier of its interest in entering into a nondisclosure agreement permitting access to such data as necessary for review in the context of this proceeding.

6. In the event a mutually acceptable nondisclosure agreement cannot be negotiated by May 31, 1994, parties may seek an appropriate ALJ ruling granting remedial relief.

Dated May 5, 1994, in San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Extension of Time to Provide Supplemental Information and Providing for Access of Confidential Data on all parties of record in this proceeding or their attorneys of record.

Dated May 5, 1994, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

TRP/bwg

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART MOTIONS FOR CONFIDENTIAL TREATMENT OF DATA

By Administrative Law Judge (ALJ) rulings dated April 11, and April 22, 1994, certain respondents in this proceeding were directed to provide information to the Commission for their cellular operations concerning average subscriber rates, total number of cellular units in service, and capacity utilization rates. Much of the responsive data was provided confidentially pursuant to Commission General Order (GO) 66-C and Public Utilities (PU) Code § 583, but with no justification for the requested confidential treatment.

A subsequent ALJ ruling dated May 5, 1994 directed parties asserting claims of confidentiality under GO 66-C to file a motion by May 16, 1994 providing justification for confidential treatment, based on the standard applied in Pacific Bell, 20 CPUC 2d 237, 252 (1986). Under that standard, confidential treatment would be granted only upon a showing that release of the data would lead to "imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental." Any party (other than the Commission's Division of Ratepayer Advocates) interested in reviewing any of the data submitted under claims of confidentiality was directed to advise the respective cellular carrier of its interest in entering into a nondisclosure agreement permitting access to such data as required for purposes of this proceeding.

In response to the ALJ ruling, the carriers submitted the requested motions formally requesting confidential treatment for

information provided and offered reasons which they believed justified their confidentiality requests. Some of the carriers disputed the validity of applying a standard as rigorous as that adopted in Pacific Bell for purposes of cellular carriers' confidentiality claims. For example, Bay Area Cellular Telephone Company (BACTC) argues that because cellular carriers face a more competitive environment than was faced by Pacific Bell at the time the cited standard was set, it is not appropriate to hold carriers to such a stringent standard. Yet, because it believes the information provided by the carriers is clearly of such significance to their competitive positions, BACTC argues that the Pacific Bell standard is clearly met anyway, and its legal relevance need not be tested in this case.

Although the carriers agreed generally as to the scope of data to granted confidential treatment, they also expressed some differences of opinion. For example, Los Angeles Cellular Telephone Company (LACTC) does not object to disclosure of the total number of subscriber units as of March 1994, or of the total percentage of units on alternative plans, but does object to disclosure of the precise number of units in each plan, or the minutes of use consumed in each user category. LACTC also has no objection to disclosure of the total number of cell site sectors in operation since this information may be derived from public files. By contrast, the other carriers object to disclosure of both the aggregate number of subscribers on all discount plans as well as the number of subscribers on each individual plan.

Carriers argue that information submitted concerning the number of subscribers under individual payment plans and capacity utilization data is presented in a manner to reveal commercially sensitive information about the carrier's market share and the success of marketing strategies. They contend that disclosure to competitors of detailed information about subscriber response to specific plans would allow competitors to tailor their marketing

plans in response to the carrier's subscribership patterns by pricing plans. Disclosure of subscriber data could enable a competitor to possibly structure an advertising sales message claiming superiority over the competing carrier based on total subscribers or number of subscribers by a specific customer segment. Disclosure of the carriers' capacity utilization data could likewise allow competitors to glean sensitive data as to the configuration and use of the carrier's system as a basis to make planning decisions rather than basing decisions on each competitor's independent analysis of the marketplace.

On May 26, 1994, Cellular Resellers Association, Inc. (CRA) filed a response to the collective motions of the cellular carriers requesting confidential treatment. CRA states that by letters dated May 12, 1994, it requested from each of the carriers to be provided a copy of the data submitted on a confidential basis to the Commission under a nondisclosure agreement. As of May 26, CRA had received data to be held confidentially only from GTE. By letter of May 20, 1994, McCaw refused to provide CRA access to the confidential data even under a nondisclosure agreement. While it has apparently not responded to CRA, BACTC stated in its Motion that it is "fully prepared to disclose even this highly confidential information to counsel for other parties and their designated experts pursuant to customary non-disclosure agreements."

CRA thus requests an ALJ ruling ordering that all of the requested data dated prior to 1992 be publicly released since it would not cause any imminent or direct harm of major consequence. CRA further requests that it be provided all other data for 1992-93 pursuant to a reasonable nondisclosure agreement in the manner agreed to by GTE.

Discussion

Two issues must be resolved relating to nondisclosure of the submitted data. First, what portion, if any, of the data

should be restricted from public disclosure. Second, would disclosure of any of the data to CRA even under a nondisclosure agreement result in competitive harm to cellular carriers?

As to carriers' challenge to the Pacific Bell case as a relevant precedent by which to judge the confidentiality claims of cellular data, no convincing arguments were offered to justify abandoning the standard in this instance. The extent to which cellular carriers are competitive is a contested issue in this proceeding. It would be prejudging this issue to discard the Pacific Bell standard on the premise that cellular carriers are fully competitive. In any event, it has not been shown that even assuming the carriers were competitive, that the standard, itself, should be discarded. If anything, only the determination of how to apply the standard, i.e., what constitutes "imminent and direct harm of major consequence" might be influenced by the degree of competitiveness in an industry. Accordingly, the Pacific Bell standard requiring a showing of "imminent and direct harm of major consequence" is relevant in evaluating the carriers' motions in this instance. Under the Pacific Bell standard, "in balancing the public interest of having an open and credible regulatory process against the desires not to have data it deems proprietary disclosed, we give far more weight to having a fully open regulatory process." (Id. 252.)

It is concluded that the respondents have provided adequate justification for confidential treatment of information on the basis of "imminent and direct harm" relating to certain information only. Confidential treatment is warranted for the number of subscribers associated with specific billing plans and for data relating to capacity utilization, at least for recent periods. As explained above, such information has commercial value to competitors which could be used to the detriment of the carrier disclosing it. On the other hand, carriers have not shown that "imminent and direct harm" will result from disclosure of

information relating to the aggregate number of subscribers associated with all discount plans of a given carrier, or the aggregate number of subscribers serviced by resellers. LACTC, for example, acknowledges that disclosure of aggregate subscribers under all discount plans would not be competitively damaging in its case. No other carrier explained how its circumstances so differed from those of LACTC such that disclosure of such aggregate data could be used to its significant competitive harm.

Carriers generally agree that the rate information in their data responses which is derived from published tariffs can be publicly disclosed without competitive harm. Accordingly, since no basis has been provided to restrict such information, such publicly available tariff data will not be subject to confidential treatment.

CRA argues that data for the period covering 1989-1991 should be publicly released because of its age (almost 2-1/2 years old). CRA's argument is reasonable. Given the rapid pace of technological change and customer growth within the cellular industry, historical data can become quickly outdated and of limited value to competitors in evaluating strategies prospectively. There is little likelihood that historical information as old as from 1989-91 could cause "imminent and direct harm of major consequence" in such a manner.

Regarding the dispute over whether CRA should be granted access to confidential data under a nondisclosure agreement, the following procedure will be adopted. CRA shall be granted access to the data responses provided by carriers on the following terms. A redacted copy of the data responses provided to the Commission by the carriers shall be provided to CRA without the need for a nondisclosure agreement. Information designated confidential under this ruling shall be redacted from the copy provided to CRA.

A separate unredacted version of the data responses disclosing data found to be confidential under this ruling shall be

provided only to designated reviewing representatives of CRA under the terms of an appropriate nondisclosure agreement. The terms under which reviewing representatives shall be designated are outlined in the order below. This approach provides a balance between the need to encourage open public involvement in Commission proceedings versus the need to protect sensitive proprietary data with commercial value to competitors.

IT IS RULED that:

1. The carriers' motions for confidential treatment of submitted data is granted, in part. The data marked confidential and proprietary by the cellular carriers submitted pursuant to ALJ rulings dated April 11 and April 22, 1994 shall be restricted from public disclosure in accordance with General Order 66-C and Public Utilities Code § 583, except for the following:

   a. All data relating to the calendar years 1991 and earlier.

   b. For data relating to calendar years 1992 and 1993, only the following shall be publicly disclosed:

      (1) Aggregate activated subscriber numbers on discount rate plans, without disclosing numbers on individual plans.

      (2) Aggregate activated numbers on basic rate plans.

      (3) Aggregate activated numbers subscribers divided between wholesale and retail service.

      (4) Publicly available tariff information.

      (5) Total number of cell site sectors in operation.

2. Within five business days following issuance of this ruling, a redacted copy of the data responses provided to the Commission pursuant to this proceeding by the carriers shall be